decisions from other circuits cited by petitioner in fact involved private efforts to sue under § 13(d) in the context of a tender offer or acquisition of shares for the purpose of acquiring control of the issuer. Far from a split of authority, the decision below is the first Court of Appeals decision addressing the question whether a private plaintiff may maintain a cause of action for a violation of § 13(d) absent a tender offer or accumulation of stock for the purpose of acquiring control of the issuer. There is no urgency requiring this Court's immediate consideration of an issue that is so immature.

Even if there were a split, which there is not, this case would provide a particularly poor vehicle for this Court's review of the issue. The only respondent before this Court, CDC, is not even alleged to have had any disclosure obligations under § 13(d). CDC did not try to exercise control over itself, and, in any event, issuers of securities like CDC are specifically exempted from § 13(d)'s disclosure obligations. 15 U.S.C. § 78m(d)(6)(C). Petitioner contends only that Mr. Yip (really APOL) had an obligation to file a Schedule 13D, and that Mr. Ch'ien's cooperation with Mr. Yip should have been disclosed. But petitioner was never able to establish the district court's personal jurisdiction over Mr. Yip, APOL or Mr. Ch'ien. Petitioner is thus asking this Court to review whether § 13(d) permits a private right of action for failure to make certain disclosures on a Schedule 13D in the circumstances of this case without having before it the party allegedly obliged to make such disclosure. Even if this were an issue warranting this Court's review, this Court should await a case where the party subject to the disclosure obligation is present to explore fully the reasons why the choice was made not to file a Schedule 13D.

Further, this case arises in a poor factual context for this Court to review the limits of the disclosure obligations under § 13(d). Petitioner is trying to transform the Williams Act, which the text and the legislative history indicate is an

investor protection statute, into a vehicle for regulating corporate governance. Mr. Yip and Mr. Ch'ien were both members of the Board of Directors before the challenged conduct at issue took place. They remained so after the challenged conduct at issue. None of the text, legislative history, or caselaw under the Williams Act indicate that it is concerned with how those already exercising influence and control over a corporation choose to exercise such influence or control. Indeed, Petitioner is not seeking to vindicate any rights he has as an investor. He sued to regain his seat on the board of directors. Even if the question presented were worthy of this Court's review, which it is not, this Court should consider the question in the context of a defendant who changed his status from a passive investor into one who asserted control or influence over the corporation.[3] This is not such a case.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS WARRANTING THIS COURT'S REVIEW.

1. The decision below created no conflict at all. The decision below creates no split of authority between the Seventh Circuit and any other Court of Appeals. No other Court of Appeals decision even confronts the precise question presented here: whether a cause of action under § 13(d) may arise outside the context of a tender offer or aggregation of shares for the purpose of acquiring control of the issuer. All of the cases relied upon by Petitioner as supposedly in conflict with the Seventh Circuit's decision here in fact involved explicit allegations of either a tender offer or the acquisition of stock for the purpose of acquiring control of the issuer.

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[3] The Securities And Exchange Commission has espoused the view that nominating and electing directors "should not be deemed as having a purpose or effect of changing or influencing control of the company." Security Holder Director Nominations, 68 Fed. Reg. 60784, 60805 (Oct. 23, 2003).

In *GAF Corp. v. Milstein*, 453 F.2d 709 (2d Cir. 1971), the Second Circuit considered whether an alleged conspiracy among four shareholders to pool their combined holdings of 10.25% of the outstanding stock of GAF Corp. to effect a takeover of that company should fall within the reach of § 13(d). The Second Circuit held that the formation of the shareholder group resulted in an acquisition by the group of the shares that had been owned individually by its members before the group was formed. Thus, the group had acquired 10.25% of the outstanding stock of GAF Corp. for the purpose of effecting a takeover of GAF Corp., bringing the acquisition of shares by the group within the ambit of §13(d).

The petition implies that the Second Circuit, in *GAF Corp.*, recognized a cause of action under § 13(d) in the absence of a control purpose because "[t]here was no indication of any ongoing effort to seize control" of GAF Corp. Pet. 14. However, the Second Circuit explicitly recognized that "[t]he complaint here alleges that past violations of section 13(d) are continuing and that the conspiracy to take over GAF 'continues unabated.'" *GAF Corp.*, 453 F.2d at 714 n.11.

In *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156 (9th Cir. 1992), the Ninth Circuit addressed allegations that Pennzoil had filed a materially misleading Schedule 13D regarding its ownership of stock in Chevron. Chevron explicitly alleged that Pennzoil's Schedule 13D was misleading because it failed to disclose an intent to attain a control position. The district court granted Pennzoil's motion for summary judgment on the ground that affidavits of Pennzoil's directors established that at the time of the Schedule 13D filing, Pennzoil did not intend to exert control over Chevron management. It further ruled that "evidence submitted by Chevron concerning discussions by Pennzoil officials of the possibility of exercising control over Chevron . . . were insufficient to create a genuine issue of material fact as to the good faith of Pennzoil's disclosure." *Id.* at 1157. The Ninth Circuit reversed, concluding that the evidence submitted by

Chevron did allow for a reasonable inference to be drawn that Pennzoil's Schedule 13D was misleading because it failed to disclose Pennzoil's intent to attain a control position. *Id.* at 1161.

Dan River, Inc. v. Unitex, Ltd., 624 F.2d 1216, 1221 (4th Cir. 1980) involved Dan River's appeal from the dismissal of its complaint alleging that a Schedule 13D filed by Unitex failed to disclose that one of the purposes of Unitex's acquisition of Dan River stock was "to seek a position of sufficient control or influence in Dan River to enable . . . defendants to obtain on unduly favorable terms textiles made by Dan River." Far from allowing a § 13(d) action in the absence of an acquisition of stock for the purpose of controlling the issuer, the Fourth Circuit noted that an issue that the district court should have addressed, but did not address, was whether Unitex's Schedule 13D was misleading for the specific failure to disclose a control purpose related to its acquisition of Dan River stock. That issue presented questions of fact regarding the purpose of Unitex's acquisition of Dan River stock that were not properly resolved on a motion to dismiss. Though Unitex declared in its Schedule 13D that the purpose of its acquisition of Dan River stock was to make an "equity investment," it also disclaimed making the purchases as a "passive investor." The Fourth Circuit recognized that "[i]mplicit in this disclaimer is the idea that there was some purpose beyond mere investment for investment sake. . . . [T]he defendants are looking to the purchase of approximately twenty percent of the outstanding equity stock in Dan River. Such an accumulation of stock in a publicly held corporation frequently is regarded as control of a corporation." *Id.* at 1225. The Fourth Circuit remanded to the district court for further inquiry "into the defendants' purpose in purchasing large amounts of Dan River stock." *Id.* at 1226.

The remaining cases from the Courts of Appeals that supposedly are in conflict with the decision below are merely

cited without discussion. Pet. 11-12. A review of them indicates that they no more support Petitioner's erroneous claim of a conflict than does *GAF Corp., Chevron, Inc.* or *Dan River, Inc.*. Each of those decisions addresses factual settings involving either a tender offer or an acquisition of stock for the purpose of acquiring control of the issuer. *See General Aircraft Corp. v. Lampert*, 556 F.2d 90, 95-96 (1st Cir. 1977) (concluding that the district court "did not err in finding . . . that appellants' Schedule 13D was inaccurate and misleading in stating that the purchase of shares was for the purpose of investment rather than acquisition of control"); *Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707, 713 (5th Cir. 1984) ("On the basis of ample evidence, the trial court found that . . . Smith concealed its intent to acquire control of Gearhart by filing a 13(d) disclosure statement and amendments to it that failed to reflect that intent, stating rather that it wished to acquire the Gearhart stock for 'investment.'"); *Chromalloy Am. Corp. v. Sun Chem. Corp.*, 611 F.2d 240, 246 (8th Cir. 1979) ("There is ample support in the record for the finding of a control purpose. . . . The district court further found that Sun has prepared an 'acquisition model' with Chromalloy as a 'target.'"); and *Florida Commercial Banks v. Culverhouse*, 772 F.2d 1513 (11th Cir. 1985) (concluding that an issuer has a private right of action under §13(d) to obtain corrective disclosure from a tender offeror).

Finally, Petitioner claims that the Seventh Circuit has created an intra-circuit split with its prior decision in *Indiana Nat'l Corp. v. Rich*, 712, F.2d 1180 (7th Cir. 1983). Pet. 13-14. This Court, of course, does not typically review cases involving mere intra-circuit splits of authority. *See Davis v. United States*, 417 U.S. 333, 340 (1974) (noting Court's previous denial of certiorari when case was first subject to a petition for certiorari and only an intra-circuit split existed). In any event, Petitioner is, once again, wrong. In *Indiana Nat'l*, the Seventh Circuit recognized that there is an implied

private right of action for an issuer corporation to seek injunctive relief on behalf of its shareholders under § 13(d). Petitioner mischaracterizes *Rich* as a case in which the Seventh Circuit "effectively sustained the legal sufficiency of plaintiff's § 13(d) claim *notwithstanding the absence of allegations regarding a tender offer or a control contest.*" Pet. 14 (emphasis added). To the contrary, on the first page of the opinion in *Rich*, the Seventh Circuit noted that the complaint alleged that "defendants' Schedule 13D contained materially false and misleading information, in that it failed to disclose the defendants' intention to acquire control of Indiana National." *Rich*, 712 F.2d at 1181. Indiana National filed the complaint because it believed it was facing an imminent battle for control that had not been properly previewed in a Schedule 13D filing. That the Seventh Circuit recognized that it was dealing with a situation involving an imminent contest for control is clear in its characterization of the manner in which Congress intended § 13(d) to protect shareholders: "by generating a 'fair fight' between the incumbent management and the persons believed to be seeking to acquire control, in order that the shareholders may make an intelligent decision between them when called upon to do so." *Id.* at 1185.

The Seventh Circuit's decision here created no split of authority. It merely prevented petitioner from expanding the private right of action under § 13(d) farther than any other court has ever had occasion to apply it before: outside the context of a tender offer or other accumulation of stock for the purpose of obtaining control of the issuer. This Court, as noted above, has clearly indicated that the Williams Act's "sole purpose" is "the protection of investors who are confronted with a tender offer." *Piper*, 430 U.S. at 35. All the cases in the Courts of Appeals have recognized a private right of action under § 13(d) in that context. None of them have recognized a private right of action beyond that context.

There is thus no conflict among the Courts of Appeals requiring this Court's review.

2. The decision below is the first occasion any Court of Appeals has had to address the question presented and this Court's review now would be premature. This Court does not typically rush to review a question of federal statutory law that has not had the benefit of consideration from a variety of the Courts of Appeals. And this case presents no circumstances warranting an exception to that generally prudent practice.

Contrary to petitioner's suggestion, the decision below does not conflict with any decisions of this Court. Pet. 23-24. Respondent does not dispute the general proposition that "when Congress amends a statute which has been judicially construed as providing an implied private right of action, Congress intends to approve and ratify the private right of action so implied." *Id.* at 23 (citing cases). But the Seventh Circuit has not held that there is no private right of action under § 13(d). The Seventh Circuit has merely concluded that such a right of action is limited to those circumstances involving a tender offer or other accumulation of stock for the purpose of obtaining control over the issuer. In so holding, the Seventh Circuit properly relied upon decisions from this Court stating that the Williams Act is designed to provide investors with information so they can best determine how to respond to a corporate takeover effort. *Piper*, 430 U.S. at 35; *Rondeau*, 422 U.S. at 58 ("The purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualifications and intentions of the offering party."). Far from standing in conflict with this Court's prior decisions, the decision below stated a rule that flows from this Court's own statements of the specific purpose of the Williams Act.

Petitioner further claims that the Seventh Circuit's rule will prove "unworkable" in practice because it is "vague,

ambiguous and incomprehensible." Pet. 24. Such a claim is premature and overblown.

The claim is overblown because the absence of litigated cases involving assertions of private rights of action outside the context of a tender offer or other accumulation of stock for the puropose of obtaining control of the issuer suggests that members of the investing public do not see the circumstances of this case as presenting a substantial problem in securities law or regulation. If the investing public were concerned about the absence of private rights of action under § 13(d) in the kind of situation alleged here — a current member of the board of directors exercising his judgment to vote his shares against an incumbent member of the board — this would not have been the first case to reach the Court of Appeals presenting the issue. Further, petitioner himself suggests that the Seventh Circuit's rule is perfectly comprehensible when he claims that "[a]lmost every case involving an alleged § 13(d) violation" could meet the Seventh Circuit's standard. Pet. 24-25.[4] If the Seventh Circuit has adopted a standard broad enough to capture all allegations of violations of § 13(d), there is nothing for this Court to clarify.

In any event, petitioner's claim of unworkability is premature. As noted above, this the first case in which the question presented has been considered by a Court of Appeals. There is no need for this Court to act quickly to clarify any ambiguity in the Seventh Circuit's standard (even if one existed) before either the Seventh Circuit or other Courts of Appeals have had the opportunity to further refine

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[4] Petitioner subsequently argues that the Seventh Circuit erroneously failed to recognize that his claim does meet its supposedly newly minted standard. Pet. 25-27. Such a claim of the mere erroneous application of a legal standard to the facts alleged in a complaint does not warrant this Court's review. Sup. Ct. R. 10 (stating that a "petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law").

and clarify the rule themselves as new circumstances arise. The reasons to wait for further development in the courts below is particularly strong here given the apparent lack of any concern among members of the investing public demonstrated by the apparent absence of other investors asserting claims like Petitioner's.

II. THIS CASE PRESENTS A POOR VEHICLE FOR THIS COURT'S REVIEW OF THE QUESTION PRESENTED.

Even if the question presented were one involving a split of authority that was sufficiently developed in the lower courts to warrant this Court's review (which it is not), this case would present a poor vehicle for such review. Petitioner was never able to obtain personal jurisdiction over the only parties he claims are subject to the disclosure obligations of § 13(d). Thus, the only respondent before this Court was not itself subject to the disclosure obligations of § 13(d). Further, given the nature of the relief petitioner seeks, this case presents the question of the scope of § 13(d) in a context wholly divorced from its purpose of protecting investors.

1. CDC is not and is not alleged to be subject to the disclosure requirements of § 13(d). Petitioner does not and cannot claim that CDC was required to make any disclosure under § 13(d). Issuers of securities are specifically exempt from § 13(d)'s disclosure obligations. 15 U.S.C. § 78m(d)(6)(C). In any event, SEC Rule 13d-1(e)(2) provides that a person who has acquired or holds more than 5% of an issuer's securities "with a purpose or effect of changing or influencing control of the issuer" may not "[v]ote or direct the voting of the securities" without filing a Schedule 13D ten days in advance. CDC was not alleged to hold more than 5% of its own stock with a purpose or effect of changing or influencing control of CDC. CDC is not alleged to have voted its securities improperly without having filed a Schedule 13D. CDC is not alleged to have been required to file a Schedule 13D at any time.

Instead, petitioner claims that Mr. Yip, on behalf of APOL, was required to disclose, through a form Schedule 13D, his intention to direct that APOL's shares be voted against petitioner in the board election, and further that Mr. Ch'ien was likewise going to vote his shares against petitioner as well. But none of Mr. Yip, APOL or Mr. Ch'ien have ever been brought within the jurisdiction of the court.

This Court should not review the question of whether Mr. Yip should have made any disclosure (on behalf of APOL) without either Mr. Yip or APOL present before the Court. To review the question without those parties present before the court would result in what is essentially an advisory opinion. Petitioner is not entitled to any relief requested unless he can establish that *someone* violated § 13(d). Petitioner simply cannot establish his right to a judgment against CDC based even on his own view of the scope of § 13(d), and CDC is the only party subject to the jurisdiction of the court. The only persons who could even conceivably have violated § 13(d) are not before the court.[5] Therefore, this Court's review of the Seventh Circuit's standard could not result in any ultimate change in the outcome of the case.[6] Even if this Court

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[5] Respondent argued before the Seventh Circuit that CDC could not, as a matter of law, have violated § 13(d). Petitioner argued that the court could find that CDC violated § 13(d) by virtue of its decision to count the shares voted by Mr. Yip and Mr. Ch'ien. Petitioner's novel theory was supported by neither caselaw, statutory text, the text of any SEC Rule, or the policies behind the Williams Act. However, the Seventh Circuit never reached this potentially alternative ground for affirming.

[6] For the same reason, calling for the views of the Solicitor General is unnecessary here. While petitioner claims that the Seventh Circuit improperly failed to defer to the views of the SEC, Pet. 15-16, even petitioner recognizes that the SEC asserted only that Mr. Yip should have filed a Schedule 13D. Nowhere does the SEC claim that CDC should have filed a Schedule 13D or otherwise failed to abide the dictates of § 13(d). Indeed, the SEC explicitly recognized that CDC did not violate § 13(d). In any event, the courts need not defer to an agency's litigating position with respect to a statute, which is all that occurred here. *Bowen v.*

concludes that the question presented warrants review, then, this Court should await a case where the outcome turns on the disputed scope of § 13(d).

2. This case involves a factual setting removed from the investor protection purpose of the Williams Act. As discussed above, and as noted by the Seventh Circuit in the decision below,

> [w]ithout fail, the courts that have examined the legislative history have arrived at the same conclusion: In enacting § [13(d)], Congress sought to empower the common investor with adequate information regarding those seeking control of an issuer through a tender offer or other method of acquisition so that an individual investor is able to decide whether to retain or dispose of his stock.

Edelson, 405 F.3d at 633. This Court has twice indicated that the Williams Act exists for the purpose of protecting investors faced with making investment decisions in the context of an effort by an outsider to obtain control of the issuer. *Piper*, 430 U.S. at 28; *Rondeau*, 422 U.S. at 58. The Williams Act provides investors with critical information in connection with an important investment decision at the moment when an outsider and incumbent management are battling for control of the issuer. *Piper*, 430 U.S. at 29.

Petitioner, though an investor in CDC, has not filed a complaint that seeks to vindicate the purpose of the Williams Act. The remedy petitioner seeks is unconnected to any investment decision he had to make, and the facts he alleges do not involve a contest for control of CDC between an outsider and incumbent management. Petitioner is complaining that Mr. Yip exercised his right to vote against him in an election for a seat on the board. Mr. Yip was not an

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Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate.")

outsider engaged in a contest with incumbent management. Mr. Yip was a member of the board himself who, in that capacity, was known to all investors as someone exercising influence over CDC. Even counting a decision to vote for or against a candidate for the board of directors as an "investment decision" (and nothing indicates that such a decision should count as an investment decision under the Williams Act) Petitioner nowhere alleges that he lacked crucial information in connection with any investment decision *he* had to make. Petitioner was going to vote in favor of his election whether Mr. Yip indicated he would vote against him or not. What Petitioner seeks is an opportunity to more effectively campaign for his election to the board.

It is thus petitioner who is contorting the Williams Act. He is divorcing it from anything having to do with the purchase or sale of securities and attempting to transform it into a statute that regulates the manner of corporate elections for seats on the board of directors. Petitioner can cite no authority for the proposition that the Williams Act exists to regulate issues connected with corporate governance, such as a decision by one incumbent member of the board to vote his shares against the retention of another.

In the end, this case, involving a dispute between two parties who were, at the relevant time, both directors of CDC with access to all information relevant to investment decisions, provides a poor opportunity to consider the scope of § 13(d). Even if the statute *could* be read to support a private right of action outside the context of a tender offer or other accumulation of stock for purpose of exercising control, there is no reason to believe it applies in connection with a current board member's decision to vote his shares as he pleases in connection with a board election.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 05-399

IN THE

Supreme Court of the United States

HARRY EDELSON,

Petitioner,

v.

CDC CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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Petitioner Harry Edelson ("Edelson") hereby submits his Reply Brief in Support of his Petition for Writ of Certiorari.

I. CONTRARY TO CDC'S POSITION, THE SEVENTH CIRCUIT DECISION CREATED A CIRCUIT SPLIT.

In its Brief in Opposition ("Op.Br."), respondent CDC Corporation ("CDC") disputes that the Seventh Circuit's decision in this case (*Edelson v. Ch'ien*, 405 F.3d 620 (7th Cir. 2005)) creates a Circuit split regarding the scope of the implied private right of action under §13(d) of the Securities Exchange Act of 1934 ("1934 Act"; 15 U.S.C. §78m(d)). CDC contends that the fact patterns in some of the cases cited by Edelson can be reconciled with the Seventh Circuit's *Edelson* decision. However, the salient point remains that no other Circuit has *limited* or *restricted* the §13(d) right of action to circumstances involving "a tender offer or other contest for control", as did the Seventh Circuit in this case (405 F.3d at 634).

Instead, the decisions cited by Edelson hold generally that stockholders and issuers (as the *de facto* representatives of stockholders) can sue under §13(d), without restriction or qualification. Tellingly, CDC cites no case (other than the decision below) in which a §13(d) claim was dismissed because no "tender offer or other contest for control" had yet ensued.

Seeking to fill this void, CDC observes that many of the cases cited by Edelson involved allegations that a §13(d) filer had misrepresented or failed to disclose its *intent* to change control. CDC notes that in *Chevron Corp. v. Pennzoil Corp.* 974 F.2d 1156 (9th Cir. 1992), plaintiff alleged a Schedule 13D filing "was misleading because it failed to disclose an intent to obtain a control position". Similarly, CDC describes *Dan River, Inc. v. Unitex, Ltd.*, 624 F.2d

1216, 1221 (4th Cir. 1980) as involving an alleged failure "to disclose a control purpose". Op.Br. at 9-10.

However, the Seventh Circuit's decision requires far more than an allegation that stock was acquired or accumulated with the *intent* or *purpose* of obtaining control. Instead, the Seventh Circuit flatly held that no §13(d) action will lie absent a tender offer or a "control contest", which Seventh Circuit described as a situation in which an individual investor is forced to "decide whether to retain or dispose of his stock". 405 F.3d at 633. That Court also plainly stated that, "[T]here does not appear to be any indication in the language of §13(d) that Congress intended a remedy for individual investors who were not faced with the choice of retaining or disposing of their stock in the face of an *imminent* change in control." *Id.*, quoted by CDC at Op.Br., p. 6.

This language reveals beyond doubt that the Seventh Circuit was breaking new ground. There was no "tender offer or contest for control" underway in either *Chevron* or *Dan River*. In neither case were the issuer's stockholders faced with an imminent decision regarding whether to hold or sell their stock. Thus, under the Seventh Circuit's test, the §13(d) claims in those cases would not be actionable.[1]

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[1] The same considerations apply to *GAF Corp. v. Milstein*, 453 F.2d 709 (2d Cir. 1971). In the Petition, Edelson noted that in *GAF*, a proxy contest had already occurred, and there was no indication of an ongoing effort by defendants to obtain control of the plaintiff-issuer. CDC responds that the Second Circuit recognized that the complaint in *GAF* alleged that the conspiracy to take control

Indeed, if the Seventh Circuit's decision required only that a §13(d) plaintiff allege that stock was acquired with a purpose or intent to change control, then Edelson's §13(d) claim would have been upheld. As Edelson alleged, defendant Peter Yip Hak Yung ("Yip") made Schedule 13G filings reflecting his acquisition (in the name of defendant Asia Pacific Online Ltd. ("APOL")) of an *additional* 4.3 million CDC shares in January 2003. Yip's beneficial ownership percentage increased by 4.25%, from 14.36% to 18.61%. Cmpl. ¶¶15-16 and Exs. A and B thereto. As Edelson explained in the Petition (at 25-26), the *additional* 4.3 million shares acquired by Yip were the swing votes that resulted in the removal of Edelson and J. Carter Beese ("Beese") from the CDC Board.

Clearly, Yip had an "intent" and "purpose" to change control over CDC. In fact, control changed. CDC's only two American directors, who were two-thirds of the audit committee, were ousted. Two of seven directors – the two most outspoken critics of management – were replaced by Yip's and Ch'ien's hand-picked lackeys. Yip and Ch'ien thereby converted the Board of CDC, a public company traded on NASDAQ, into their personal Hong Kong cabal and fiefdom.

The Seventh Circuit nevertheless rejected Edelson's §13(d) claim even though he plainly alleged: (1) an "acquisition or accumulation of stock" (here, Yip's acquisition of an *additional* 4.3 million shares)[2]; and (2) an intent or purpose to change control (Yip's and Ch'ien's intent to oust Edelson and Beese from the Board). Clearly then, in the Seventh Circuit, it is

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"continues unabated'" (Op.Br. 9, quoting 453 F.2d at 714, n. 11. Nevertheless, nothing in *GAF* reflects that the issuer's stockholders had to decide whether to hold or retain their shares, in view of the completion of the prior proxy contest.

[2] At the same time, Ch'ien acquired 200,000 additional CDC shares.

no longer sufficient to allege only that a §13(d) filer acquired or accumulated stock without disclosure of an existing control purpose or intent; a claim can be stated only if the §13(d) plaintiff also alleges that stockholders are confronted with the imminent need for stockholders to decide whether to hold or to sell. Thus, allegations of the type that CDC stresses were made in *Chevron* and *Dan River* are no longer sufficient in the Seventh Circuit, and the Seventh Circuit decision clearly creates a split among the Circuits.

Indeed, the Seventh Circuit departed from its own past precedent (which was consistent with the prevailing law in the other Circuits). CDC characterizes as erroneous Edelson's statement that *Indiana National Corp.* v. *Rich*, 712 F.2d 1180 (7th Cir. 1983) sustained a §13(d) claim in "the absence of allegations regarding a tender offer or control contest". Op.Br. at 12, quoting Petition at 14. According to CDC, the *Indiana National* Court referred to plaintiff's allegation that defendants had failed to disclose their intention to acquire control. However, in *Indiana National* (as in *Chevron* and *Dan River*), there were no circumstances creating an imminent need for the issuer's shareholders to decide whether to hold or sell. By departing from past precedent, by imposing the previously unknown requirement that a §13(d) claim lies only in situations involving a tender offer or control contest, the Seventh Circuit has created a split among the Circuits.

II. EDELSON'S ACTION IS A PROPER VEHICLE FOR REVIEW OF THE ISSUE PRESENTED.

CDC also characterizes this case is a "poor vehicle" for this Court to address the new limitations created by the Seventh Circuit's decision (Op.Br. at 7). CDC argues that, "The only respondent before this Court, CDC, is not even alleged to have had any disclosure obligations under §13(d)."

However, CDC filed the Motion to Dismiss that was granted by the District Court, and CDC argued in the Seventh Circuit for affirmance of that dismissal. CDC has now appeared before this Court as well. If CDC was merely a nominal party to this case (as it now seeks to characterizes itself), CDC would not have litigated this case as vigorously as it has. CDC's Opposition Brief acknowledges that its motion to dismiss Edelson's §13(d) claim was not confined its own lack of §13(d) disclosure obligations (Op.Br. at 5). Instead, CDC also vigorously argued that Edelson lacked standing to sue and that the §13(d) right of action was confined solely to cases involving tender offers.

Obviously, throughout this case, CDC has been acting as the "front" for its principal managers, Yip and Ch'ien. Since CDC has raised, briefed and argued the issues relevant to this Court's review of the Seventh Circuit's decision, it is disingenuous for CDC to suggest that review should be denied merely because CDC is presently the only respondent.

Moreover, CDC has liability for the §13(d) violations that occurred. As CDC acknowledges (Op.Br. at 16), Edelson alleges that CDC is itself liable under §13(d) and Securities and Exchange Commission ("SEC") rules thereunder. SEC Rule 13d-1(e) disqualified Yip's APOL shares from being voted at CDC's 2003 Annual General Meeting. CDC nevertheless counted those ineligible votes, and removed Edelson and Beese from the CDC Board based on its acceptance of those ineligible votes. This case therefore presents a situation in which, as the SEC recognized in its *amicus* brief, an issuer "may be a necessary party [to a §13(d) case] in order to effectuate full and proper relief" (p. 19, n. 10).

CDC's statement that Edelson purportedly "*was never able to establish the district court's personal jurisdiction over Mr. Yip, APOL or Mr. Ch'ien*" (Op.Br. at 7) is deceptive, offensive and reprehensible. Personal jurisdiction was not obtained over those Hong Kong

defendants because they successfully ducked service of process until after the District Court's dismissal of Edelson's §13(d) claim.[3]

If Yip, APOL and Ch'ien had not evaded service, the District Court could unquestionably have exercised personal jurisdiction over them with respect to the §13(d) claim. Section 27 of the 1934 Act (15 U.S.C. §78aa) authorizes service of process "wherever the defendant may be found...". When a federal statute authorizes worldwide service, personal jurisdiction comports with due process if defendant has minimum contacts with the United States. *Sheet Metal Workers' National Pension Fund v. Elite Erectors, Inc.*, 212 F.3d 1031, 1035-36 (7th Cir. 2000); *Fitzsimmons v. Barton*, 589 F.2d 330, 332-34 (7th Cir. 1979); *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 369 (3d Cir. 2002). As officers of a company whose stock trades on NASDAQ, has offices in several U.S. cities, and has acquired several subsidiaries based in the U.S., Yip and Ch'ien indisputably had sufficient contacts with the United States to warrant the exercise of personal jurisdiction over them for federal statute issues. It is offensive for CDC even to suggest that this Court should deny certiorari because its top officers evaded service.

CDC argues that in the absence of the other defendants, "this Court's review ... could not result in any ultimate change in the outcome of this case." Op.Br. at 16. However, this Court's review could result in reinstatement of Edelson's §13(d) claim. If the dismissal is reversed, Yip APOL and Ch'ien would (as explained above) be subject to personal jurisdiction

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[3] At the outset of the case, Edelson requested defendants, pursuant to Rule 4(d), *Fed.R.Civ.P.*, to waive service of process. When defendants failed to do so, Edelson retained a private process server in Hong Kong. Multiple attempts at service were made before the process server was able to effect service, but by that time the §13(d) claim had been dismissed on CDC's motion.

with respect to that claim, and the action would then proceed as to both CDC and the other defendants.

III. EDELSON'S §13(D) CLAIM IS CONSISTENT WITH THE INVESTOR PROTECTION PURPOSES OF THE STATUTE.

CDC also argues that Edelson's claim purportedly does not seek to vindicate the investor protection purposes underlying §13(d). CDC is wrong. Edelson is a CDC stockholder; as the SEC recognized in its *amicus* brief (at 22), he has as much right to seek redress under §13(d) as any other stockholder.

CDC's asserts that the facts here "do not involve a contest for control of CDC between an outsider and incumbent management" (Op.Br. at 17). However, Edelson specifically alleged that he and Beese, CDC's two American *outside* directors, were removed from the Board by Yip and Ch'ien (the incumbent management) due to their questioning and criticism of CDC management – especially after Edelson sent a scathing e-mail asserting that (a) "Corporate governance at chinadotcom ... is falling to pieces"; (b) "The voices of independent directors are ignored or abused"; and (c) the Board was being called upon to "push through spur of the moment initiatives by management." Cmpl., ¶19 and Ex. E.

As the SEC explained, the scheme resulted in Edelson and other CDC shareholders being:

> "[I]llegally kept in the dark about the change in control plans of stockholders who were required to disclose those plans under §13(d). The solidifying of management's control over a company, to the exclusion of dissenting voices, is the kind of event that §13(d)'s disclosure requirement was intended to reveal to shareholders, see *Bath Ind. Inc. v. Blot*, 427 F.2d 97, 109 (7th Cir. 1970), and Schedule 13D expressly requires the disclosure of any

> plan to change the composition of corporate boards. *See* Schedule 13D, Item 4.

SEC *amicus* brief at 22-23. Yip's and Ch'ien's clandestine scheme deprived Edelson and other CDC stockholders of information to which they were entitled. Edelson's claim is therefore perfectly consistent with the investor protection purposes of §13(d).

The SEC's citation of Item 4 of Schedule 13D belies CDC's erroneous claim that Edelson "can cite no authority for the proposition that the Williams Act exists to regulate issues connected with corporate governance" (Op.Br. at 18). Because companies are controlled by their Boards, a possible alteration of a company's Board logically has as much effect on an investor's decision to hold or dispose of his or her stock as does a tender offer (which, after all, is merely a prelude to the offeror's acquisition of the voting power needed to elect directors). By foreclosing a private right of action for an acknowledged violation of §13(d) under these circumstances, the Seventh Circuit's decision does violence to the investment protection purpose of the statute.

CDC mischaracterizes this case as "a dispute between two parties who were, at the relevant time, both directors of CDC with access to all information relevant to investment decisions..." (Op.Br. at 18). Neither Edelson nor CDC's other stockholders had "relevant information" concerning the clandestine plot by Yip and Ch'ien to alter the composition of CDC's Board, because Yip misrepresented, on multiple Schedule 13G filings, that he had no plans to change control of CDC (indeed, CDC's own proxy statement, promulgated just weeks before the disputed 2003 Annual Meeting and prepared under the supervision of Yip and Ch'ien, *recommended* the re-election of Messers. Edelson and Beese to the Board).

CDC posits that review of the Seventh Circuit is unwarranted because "If the investing public were concerned about the absence of private rights of action under §13(d) in the kind of situation alleged here – a current member of the board of directors exercising his judgment to vote his shares against an incumbent member of the board – this would not have been the first case to reach the Court of Appeals presenting the issue." Op.Br. at 14. This argument would make sense only if CDC could show that similar situations have occurred in the past. However, CDC makes no attempt to do so. As such, CDC's assertions that regarding the ostensible "concerns" of the "investing public" rest on nothing other than rank speculation.[4]

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[4] The SEC's *amicus brief*, the SEC questioned the ability of Yip, as CDC's CEO, to report his ownership on Schedule 13G rather than Schedule 13D, because a CEO necessarily holds his or her shares "*with the effect* ... of "changing or *influencing the control* of the issuer of the securities...". SEC *amicus* brief at 31, n. 18, emphasis in the original.